

In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS

KATHLEEN CAMPBELL,

Petitioner,

v.

SECRETARY OF HEALTH,

Respondent.

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No. 17-438V

Special Master Christian J. Moran

Filed: June 10, 2020

Fact ruling; shoulder injury related to vaccine administration (“SIRVA”); onset of symptoms.

Joseph A. Vuckovich, Maglio Christopher and Toale, PA, Washington, DC, for petitioner;

Lisa A. Watts, United States Dep’t of Justice, Washington, DC, for respondent.

UNPUBLISHED RULING FINDING FACTS*

The petition, filed under the National Childhood Vaccine Injury Compensation Program, 42 U.S.C. § 300aa–10 through 34 (2012), alleges that Kathleen Campbell suffered from a shoulder injury related to vaccine administration as a result of the influenza vaccine she received on October 7, 2015. Pet., filed Mar. 27, 2017, at 1-2. A fact hearing was held on April 16, 2020, to resolve the onset of Ms. Campbell’s shoulder pain.

Procedural History

Ms. Campbell alleged a Table shoulder injury related to vaccine administration (“SIRVA”) where she developed pain in her left shoulder within 24

* The E-Government Act of 2002, Pub. L. No. 107-347, 116 Stat. 2899, 2913 (Dec. 17, 2002), requires that the Court post this ruling on its website. Anyone will be able to access this ruling via the internet (<https://www.uscfc.uscourts.gov/aggregator/sources/7>). Pursuant to Vaccine Rule 18(b), the parties have 14 days to file a motion proposing redaction of medical information or other information described in 42 U.S.C. § 300aa—12(d)(4). Any redactions ordered by the special master will appear in the document posted on the website.

hours of her October 7, 2015 influenza vaccination. Pet., filed Mar. 27, 2017, at 1. Ms. Campbell filed medical records and eventually a statement of completion on May 10, 2017.

Once the Secretary completed his review of the record, the parties engaged in initial settlement negotiations. Resp't's Status Rep., filed Oct. 30, 2017. Before proceeding further with settlement negotiations, Ms. Campbell requested the opportunity to improve the factual foundations of her case by submitting affidavits from fact witnesses. Pet'r's Status Rep., filed Dec. 14, 2017. Ms. Campbell submitted the affidavits and then proceeded with settlement. Pet'r's Status Rep. filed May 7, 2018. At a June 11, 2018 status conference, the Secretary noted that settlement negotiations had continued, but he intended to proceed with the litigation track and proposed a due date for his Rule 4 report.

In the Rule 4 report, the Secretary argued that Ms. Campbell's pre-existing shoulder injuries prevented her from claiming a Table SIRVA and her post-vaccination left shoulder pain was the result of catching her partner, Joseph Haeckel, when he fell. Resp't's Rep., filed July 6, 2018, at 6 n.4. After a status conference to discuss the Rule 4 report, Ms. Campbell was ordered to provide an affidavit to discuss her partner's fall and to consider providing an affidavit from her partner. Order, issued July 26, 2018. Ms. Campbell filed an affidavit regarding the fall but did not file an affidavit from Mr. Haeckel. Exhibit 17. The parties again entered into settlement negotiations.

At a November 16, 2018 status conference, the undersigned noted that parties had spent a long time in settlement negotiations considering the extent of damages and the case would be placed on a queue for a fact hearing after Ms. Campbell confirmed that all documentary evidence had been filed. Order, issued Nov. 19, 2018. Ms. Campbell confirmed that all documentary evidence had been filed but again requested additional time to resolve the case informally. Pet'r's Status Rep., filed Dec. 19, 2018.

After a few more months of negotiations, Ms. Campbell advised that the parties had not been able to resolve the case informally and requested that a fact hearing be scheduled. Pet'r's Status Rep., filed Apr. 17, 2019. A fact hearing was then scheduled and onset statements were ordered. Order, issued Dec. 19, 2019; order issued Jan. 9, 2020. Ms. Campbell filed her onset statement and additional evidence on February 21, 2020. The Secretary then filed his onset statement on March 12, 2020.

The pre-hearing status conference clarified that the primary issues were whether Ms. Campbell's pre-vaccination shoulder pain resolved and when Ms. Campbell's shoulder pain began post-vaccination. Order, issued Apr. 6, 2020. A fact hearing was held on April 16, 2020, in which Ms. Campbell and two other witnesses testified.¹

The onset issue is now ready for adjudication.

Standard for Finding Facts

Petitioners are required to establish their cases by a preponderance of the evidence. 42 U.S.C. § 300aa-13(1)(a). The preponderance of the evidence standard requires a "trier of fact to believe that the existence of a fact is more probable than its nonexistence before [he] may find in favor of the party who has the burden to persuade the judge of the fact's existence." Moberly v. Sec'y of Health & Human Servs., 592 F.3d 1315, 1322 n.2 (Fed. Cir. 2010) (citations omitted).

The process for finding facts in the Vaccine Program begins with analyzing the medical records, which are required to be filed with the petition. 42 U.S.C. § 300aa-11(c)(2). Medical records that are created contemporaneously with the events they describe are presumed to be accurate. Cucuras v. Sec'y of Health & Human Servs., 993 F.2d 1525, 1528 (Fed. Cir. 1993).

Not only are medical records presumed to be accurate, they are also presumed to be complete, in the sense that the medical records present all the patient's medical issues. Completeness is presumed due to a series of propositions. First, when people are ill, they see a medical professional. Second, when ill people see a doctor, they report all of their problems to the doctor. Third, having heard about the symptoms, the doctor records what he or she was told.

Appellate authorities have accepted the reasoning supporting a presumption that medical records created contemporaneously with the events being described are accurate and complete. A notable example is Cucuras in which petitioners asserted that their daughter, Nicole, began having seizures within one day of receiving a vaccination, although medical records created around that time

¹ The hearing was originally scheduled to be held in San Antonio, Texas, but, due to restrictions from the coronavirus pandemic, the hearing was held via video conferencing.

suggested that the seizures began at least one week after the vaccination. Cucuras, 993 F.3d at 1527. A judge reviewing the special master’s decision stated that “[i]n light of [the parents’] concern for Nicole’s treatment . . . it strains reason to conclude that petitioners would fail to accurately report the onset of their daughter’s symptoms. It is equally unlikely that pediatric neurologists, who are trained in taking medical histories concerning the onset of neurologically significant symptoms, would consistently but erroneously report the onset of seizures a week after they in fact occurred.” Cucuras v. Sec’y of Health & Human Servs., 26 Cl. Ct. 537, 543 (1992), aff’d, 993 F.2d 1525 (Fed. Cir. 1993).

Judges of the Court of Federal Claims have followed Cucuras in affirming findings by special masters that the lack of contemporaneously created medical records can contradict a testimonial assertion that symptoms appeared on a certain date. See, e.g., Doe/70 v. Sec’y of Health & Human Servs., 95 Fed. Cl. 598, 608 (Fed. Cl. 2010) (stating “[g]iven the inconsistencies between petitioner’s testimony and his contemporaneous medical records, the special master’s decision to rely on petitioner’s medical records was rational and consistent with applicable law”), aff’d sub nom. Rickett v. Sec’y of Health & Human Servs., 468 Fed. Appx. 952 (Fed. Cir. 2011) (non-precedential opinion); Doe/17 v. Sec’y of Health & Human Servs., 84 Fed. Cl. 691, 711 (2008); Ryman v. Sec’y of Health & Human Servs., 65 Fed. Cl. 35, 41-42 (2005); Snyder v. Sec’y of Health & Human Servs., 36 Fed. Cl. 461, 465 (1996) (stating “The special master apparently reasoned that, if Frank suffered such [developmental] losses immediately following the vaccination, it was more likely than not that this traumatic event, or his parents’ mention of it, would have been noted by at least one of the medical record professionals who evaluated Frank during his life to date. Finding Frank’s medical history silent on his loss of developmental milestones, the special master questioned petitioner’s memory of the events, not her sincerity.”), aff’d, 117 F.3d 545, 547-48 (Fed. Cir. 1997).

The presumption that contemporaneously created medical records are accurate and complete is rebuttable, however. For cases alleging a condition found in the Vaccine Injury Table, special masters may find when a first symptom appeared, despite the lack of a notation in a contemporaneous medical record. 42 U.S.C. § 300aa-13(b)(2). By extension, special masters may engage in similar fact-finding for cases alleging an off-Table injury. In such cases, special masters are expected to consider whether medical records are accurate and complete. To overcome the presumption that written records are accurate, testimony is required to be “consistent, clear, cogent, and compelling.” Blutstein v. Sec’y of Health & Human Servs., No. 90-2808V, 1998 WL 408611, at *5 (Fed. Cl. Spec. Mstr. June 30, 1998).

In determining the accuracy and completeness of medical records, special masters will consider various explanations for inconsistencies between contemporaneously created medical records and later given testimony. The Court of Federal Claims has identified four such explanations for explaining inconsistencies: (1) a person's failure to recount to the medical professional everything that happened during the relevant time period; (2) the medical professional's failure to document everything reported to her or him; (3) a person's faulty recollection of the events when presenting testimony; or (4) a person's purposeful recounting of symptoms that did not exist. La Londe v. Sec'y Health & Human Servs., 110 Fed. Cl. 184, 203 (2013), aff'd, 746 F.3d 1334 (Fed. Cir. 2014).

When weighing divergent pieces of evidence, special masters usually find contemporaneously written medical records to be more significant than oral testimony. Cucuras, 993 F.2d at 1528. Testimony offered after the events in question is less reliable than contemporaneous reports when the motivation for accurate explication of symptoms is more immediate. Reusser v. Sec'y of Health & Human Servs., 28 Fed. Cl. 516, 523 (1993). However, compelling oral testimony may be more persuasive than written records. Campbell, 69 Fed. Cl. at 779 (“[L]ike any norm based upon common sense and experience, this rule should not be treated as an absolute and must yield where the factual predicates for its application are weak or lacking.”); Camery v. Sec'y of Health & Human Servs., 42 Fed. Cl. 381, 391 (1998) (this rule “should not be applied inflexibly, because medical records may be incomplete or inaccurate”); Murphy v. Sec'y of Health & Human Servs., 23 Cl. Ct. 726, 733 (1991) (“[T]he absence of a reference to a condition or circumstance is much less significant than a reference which negates the existence of the condition or circumstance.”) (citation omitted), aff'd, 968 F.2d 1226 (Fed. Cir. 1992).

Summary of Parties' Positions

The primary factual issue to resolve is when Ms. Campbell's left shoulder pain began following her October 7, 2015 flu vaccination. In her onset statement, Ms. Campbell asserts that her left shoulder pain began within 48 hours of the vaccination. Pet'r's Onset Stat., filed Feb. 21, 2020, ¶ 17. The Secretary argues that Ms. Campbell's left shoulder pain began toward the end of October 2015, after her partner's falling incident. Resp't's Onset Stat., filed Mar. 12, 2020, ¶ L. While Ms. Campbell had prior left shoulder pain and injuries, the Secretary appears not to be arguing that Ms. Campbell's post-vaccination shoulder pain existed

continuously from before the vaccination. Resp't's Onset Stat. ¶ A-E. Because there is no dispute regarding pre-vaccination shoulder pain, the factual history and analysis will focus on the onset of post-vaccination left shoulder pain.

Summary of Evidence²

Pre-Vaccination

Kathleen Campbell was born on June 5, 1942. Exhibit 13. Ms. Campbell moved to Texas around 2011 and was involved in physical activities, including golf, and public life, including the local chamber of commerce. Tr. 69, 71, 13. Following a multi-week road trip ending in July 2014, Ms. Campbell sought treatment for a severe pain in her left shoulder, rating it a 7/10 (10 being the most painful). Exhibit 8 at 52-53. Ms. Campbell reported an 8/10 left shoulder pain to Geoffrey Millican, a sports medicine doctor. Exhibit 3 at 4-6. Dr. Millican diagnosed Ms. Campbell with a probable left rotator cuff tear. *Id.* at 6.

After having some physical therapy, Ms. Campbell attempted to play golf again in October 2014 but experienced some pain. Exhibit 9 at 19. She reported that her shoulder was almost normal and would continue her recovery with home exercises. *Id.* at 22. Through September 2015, Ms. Campbell made various trips to see family and friends but did not have any significant left shoulder issues. She also played golf regularly. Exhibit 16.

On October 7, 2015, Ms. Campbell received a flu vaccination at the pharmacy of a local supermarket. Exhibit 12.

Post-Vaccination

Prior to the fall of Ms. Campbell's partner

For the night after the vaccination, Ms. Campbell rated her left shoulder pain at 2/10. Tr. 31. On the day following the vaccination, Ms. Campbell travelled alone from Texas to meet her daughter, Janet Haddon, and granddaughter, Kathleen Ferry, in Albany, New York. Exhibit 23 (travel documents). Ms. Campbell stated that she required help on her flights to get her bag into the

² Although not all evidence is cited here, the undersigned has reviewed and considered the entire record.

overhead rack. Tr. 36. When they met in baggage claim, Ms. Haddon noted that Ms. Campbell was not as energetic as usual, and Ms. Ferry noted that Ms. Campbell complained about shoulder pain, which was not usual. Tr. 143, 186-87.

From Albany, the group traveled to North Bennington, Vermont, to visit Ms. Campbell's brother. Tr. 36. Over the next few days traveling around the area, Ms. Ferry assisted Ms. Campbell with her bags. Tr. 85, 143-44. Ms. Campbell used over-the-counter treatments for her shoulder, did not seek medical treatment, and described her pain as 3/10 during the trip. Tr. 37, 55, 87, 145, 166. Upon Ms. Campbell's return to Texas on October 14, 2015, she did not seek medical treatment. Tr. 56, 88.

On October 20, 2015, Ms. Campbell played 18 holes of golf. Exhibit 16 (golf records) at 1. She stated that her shoulder was still sore and had to compensate when swinging. Tr. 39. Ms. Campbell earned a score of 104 on this round of golf, which she agreed was about her normal score. Tr. 88; exhibit 16.

The fall of Mr. Haeckel, Ms. Campbell's partner

On October 26, 2015, Ms. Campbell and Mr. Haeckel were traveling to Mr. Haeckel's appointment in San Antonio when they stopped at a McDonald's to use the restroom. Tr. 39-40, 93; exhibit 17. Mr. Haeckel was feeling woozy so Ms. Campbell helped him inside the building keeping her right hand around his waist. Id. 40. While still holding Mr. Haeckel with her right arm, Ms. Campbell opened the bathroom door with her left arm. Id. At this point, Mr. Haeckel began to faint putting all his weight on Ms. Campbell. Id. To slow Mr. Haeckel's fall, Ms. Campbell pushed Mr. Haeckel into the wall with the right side of her body. Id. Ms. Campbell used her left hand on the door to help her push Mr. Haeckel toward the wall. Id. 95-96. Mr. Haeckel was then taken to the hospital, but Ms. Campbell did not receive any medical attention at that time. Id. 94. Ms. Campbell recounted at the time she thought that "breaking [Mr. Haeckel's] fall might have exacerbated the pain in my shoulder." Exhibit 17 ¶ 6.³

³ It is notable that Ms. Campbell did not produce the hospital record from Mr. Haeckel's trip to the emergency room. Ms. Campbell also did not produce an affidavit from Mr. Haeckel. It is conceivable that Mr. Haeckel could have added something to the account of the McDonald's incident or could have corroborated Ms. Campbell's assertion of when her shoulder pain began.

After the fall of Mr. Haeckel

From October 28, 2015, to November 11, 2015, Ms. Campbell went to a chiropractor five times for treatment. Exhibit 8 at 83-93. Ms. Campbell did not complain of left shoulder pain during these treatments or receive any treatments for left shoulder pain. Id. She only complained of pain and discomfort in her neck, back, and right hip. Id. Ms. Campbell does not know why she would have refrained from mentioning her left shoulder pain to the chiropractor. Tr. 58.

At a December 8, 2015 appointment with Dr. Millican, Ms. Campbell reported her left shoulder pain to a medical professional for the first time. Exhibit 3 at 25-26. As mentioned previously, Ms. Campbell had treated with Dr. Millican in 2014. Ms. Campbell stated that he is a good doctor who listens well. Tr. 82. Dr. Millican recorded that Ms. Campbell's new shoulder pain began after she caught her partner when he fainted six weeks ago (approximately October 27, 2015). Exhibit 3 at 25-26. Ms. Campbell rated her pain over those six weeks as recurrently hitting 9/10, and received an injection for the pain. Id. In her testimony, Ms. Campbell stated that Dr. Millican did not describe Mr. Haeckel's fall accurately. Tr. 59, 82.

On the next day, Ms. Campbell saw her primary care provider, Dr. Edward Sargent, for a wellness visit. Exhibit 4 at 8. As part of his overview, Dr. Sargent noted an incident when Ms. Campbell had to catch her partner when he fell resulting in shoulder and neck discomfort. Id. Ms. Campbell agreed that Dr. Sargent is a good doctor who listens well but did not believe the incident of her partner's fall was accurately described. Tr. 80; exhibit 17.

In mid-December 2015, Ms. Campbell travelled to Idaho to attend Ms. Ferry's graduation from Boise State University. Tr. 105-06. Leading up to the graduation, Ms. Campbell stated that she was using a sling for her left shoulder as well as other over-the-counter treatments. Tr. 170. On the day after graduation, Ms. Campbell went to the emergency room complaining of left shoulder pain. Exhibit 6 at 2 (Dec. 20, 2015). The attending physician recorded that Ms. Campbell's shoulder pain returned the previous week after an injection had initially worked well for the pain. Id. A few hours later Ms. Campbell was discharged. Id.

On the next day, Ms. Campbell returned to the emergency room with left shoulder pain and was eventually admitted to the hospital. Exhibit 6 at 18 (Dec. 21, 2015). Ms. Campbell reported to the emergency department physician that her

left shoulder pain had been present since her partner fainted and fell onto her. Id. Ms. Campbell described an inexplicable increase in pain in the previous 48 hours and later described it as an 8 or 9/10. Id.; Tr. 110. During the hearing, Ms. Campbell challenged this note's accuracy with respect to the pain's onset but agreed with its accuracy with respect to the pain's severity. Tr. 41-42, 109.

Ms. Campbell explained that she did not remember much of the next day in the hospital, December 22, 2015, due to being highly medicated and her shoulder pain being worse than that of childbirth, 10/10. Tr. 43-44, 117. During this day, the treating physician recorded the McDonald's incident as Ms. Campbell's partner fainting and falling onto her and then Ms. Campbell falling to the ground hitting her head and left shoulder. Exhibit 6 at 153. The physician noted that this incident caused Ms. Campbell "ongoing intermittent quite severe pain" in her left shoulder and neck that she did not have before. Id. In her testimony, Ms. Campbell also challenged how the beginning of her pain was described. Tr. 117. Ms. Campbell was discharged a day later. Exhibit 6 at 157-63.

Soon after Ms. Campbell returned to Texas, she saw Dr. Sargent and reported increased severe pain during her trip to Idaho. Exhibit 4 at 5 (Dec. 29, 2015). Dr. Sargent noted that Ms. Campbell was scheduled for an MRI on the same day. Id. Ms. Campbell agreed with the accuracy of this medical record. Tr. 114.

On January 7, 2016, Dr. Millican called Ms. Campbell to discuss her MRI. Exhibit 3 at 23.⁴ Ms. Campbell testified that Dr. Millican also explained that the virus from the flu vaccination could settle into the muscles of her arm and shoulder attacking the nerves. Tr. 60-61. Based on the conversation with Dr. Millican, Ms. Campbell began considering the flu vaccination as the source of her left shoulder injury. Id. Through internet research, she found the law firm that filed her vaccine claim. Id. 62. At the initial physical therapy appointment following her call with Dr. Millican, Ms. Campbell for the first time reported the flu vaccination in connection with her left shoulder pain. Exhibit 9 at 226. Ms. Campbell went through different phases of physical therapy and began to improve her left shoulder.

⁴ On the call, Dr. Millican opined that Ms. Campbell appeared to be suffering from Parsonage-Turner syndrome. Exhibit 3 at 23. Ms. Campbell has not alleged Parsonage-Turner syndrome as her injury.

On April 10, 2018, Dr. Millican wrote a letter for this litigation describing Ms. Campbell's left shoulder pain as beginning in October 2015. Exhibit 15. Dr. Millican also stated that "I can not definitively say that [Ms. Campbell's] neurologic condition resulted from the [flu] vaccination." Id. As for her current status, Ms. Campbell testified that her left shoulder is back to being fine and she has no daily living issues. Tr. 50, 116.

Findings of Fact

In the days following the October 7, 2015 vaccination, Ms. Campbell suffered mild left shoulder pain. Ms. Campbell described the left shoulder pain as a 2 or 3/10 during this time. Tr. 31, 55. During the trip to Vermont, while requiring assistance with her bags, Ms. Campbell was still able to participate in the site seeing and family events. Id. 36, 85, 55. She did not state that she missed any events or that the schedule was changed to accommodate her. Ms. Campbell did not seek medical attention during this trip, nor did she seek it when she returned home. Id. 55-56. Thus, it seems likely that the mild shoulder pain was transient and resolved within seven days of vaccination.

The resolution of Ms. Campbell's mild shoulder pain is supported by its mildness and her return to golf. Twelve days after vaccination, on October 20, 2015, Ms. Campbell played a full round of 18 holes of golf and earned a normal score. Exhibit 16; Tr. 88. It seems unlikely that Ms. Campbell would have scored as well as she did if she were having pain in her shoulder.

Ms. Campbell experienced new and more severe pain when Mr. Haekel fell on her in McDonald's on October 26, 2015. The medical records across various providers consistently recorded Ms. Campbell describing the McDonald's incident as her partner falling on her and that her severe left shoulder pain began after this incident. Exhibit 3 at 25-26 (Dr. Millican, Dec. 8, 2015); exhibit 4 at 8 (Dr. Sargent, Dec. 9, 2015); exhibit 6 at 18 (hospital admission, Dec. 21, 2015); exhibit 6 at 153 (treating physician, Dec. 22, 2015). The consistency of the accounts in four medical records reinforces the reliability of each record. For the doctors that Ms. Campbell knew, Drs. Millican and Sargent, she agreed that they were good doctors and listened well. Tr. 80, 82. Furthermore, Ms. Campbell generally agreed with the accuracy of the information presented in the medical records, objecting only to the documentation of when her shoulder pain began. It seems unlikely that four independently recorded medical records would be accurate about

most of Ms. Campbell's problems, but wrong about the same detail.⁵ Under these circumstances, it appears that the passage of time has diminished the accuracy of Ms. Campbell's memory and, therefore, the value of her testimony.

Conclusion

For the reasons explained above, the undersigned finds that Ms. Campbell's severe left shoulder pain began on October 26, 2015.

The parties are ordered to provide this ruling to any expert they retain or have retained. If the expert's opinion is not consistent with these findings of fact, the opinion is likely to not be persuasive. See Burns v. Sec'y of Health & Human Servs., 3 F.3d 415, 417 (1993) (holding that the special master did not abuse his discretion in refraining from conducting a hearing when the petitioner's expert "based his opinion on facts not substantiated by the record.").

A status conference is set for **Monday, June 29, 2020, at 2:00 PM Eastern Time**. Ms. Campbell should be prepared to propose the next step in this case.

IT IS SO ORDERED.

s/Christian J. Moran
Christian J. Moran
Special Master

⁵ The chiropractor's records from October 28, 2015, to November 11, 2015 (exhibit 8 at 83-93) do not describe any shoulder pain. This omission is, in some respect, inconsistent with the finding that Ms. Campbell began to have severe shoulder pain on October 27, 2015. However, the omission is also inconsistent with Ms. Campbell's argument that her shoulder pain began on October 7, 2015. In other words, the chiropractor's records do not help establish when the shoulder pain began.